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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 245

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, SOLE,

Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

LEON THOMAS DAVID,
Counsel for Appellees.

WALDO E. BURFORD,
Of Counsel.

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INDEX

Subject Index

	Page
State action the validity of which is assailed	2
Questions raised before the state courts	4
The judgment resting on a valid non-federal ground as well as a federal ground, it should be affirmed, or the appeal dismissed	5

Table of Cases Cited

Acker v. *Baldwin*, 18 Cal. (2d) 345	9
Brown v. *Union Pac. R. Co.*, 267 U. S. 255, 69 L. Ed. 601	6
City of New Orleans v. *New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. 142	6
Commercial Bank v. *Rochester*, 82 U. S. (15 Wall.) 639, 21 L. Ed. 117	6
Crary v. *Devlin*, 92 U. S. 397, 23 L. Ed. 510	8
DeLano v. *City of Tulsa*, 26 F. (2d) 640, cert. den. 278 U. S. 654, 73 L. Ed. 564	7, 8, 14
Dundee Realty Co. v. *Omaha*, 13 N. W. (2d) 634	9
Ellsworth v. *Gercke*, 156 P. (2d) 242	10
Euclid v. *Ambler Realty Co.*, 272 U. S. 365	6, 7, 8, 14
Eustis v. *Bullis*, 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131	6
Everson v. *Board of Education*, 91 L. Ed. 472, 67 S. Ct. 504	12
Giles v. *Teasley*, 193 U. S. 146, 48 L. Ed. 655	6
Hadacheck v. *Sebastian*, 239 U. S. 394, 60 L. Ed. 348, 36 S. Ct. 143	7
Hague v. *Comm. Ind. Organization*, 307 U. S. 496	11
Koch v. *City of Toledo*, 37 F. (2d) 336	14
Laurel Hill Cem. Ass'n v. *San Francisco*, 216 U. S. 358, 54 L. Ed. 515	7
Leventhal v. *District of Columbia*, 100 F. (2d) 94, 69 App. D. C. 229	6
Lockhard v. *Los Angeles*, 33 Cal. (2d) —, 33 Adv. Cal. 427, 202 P. (2d) 38	10

Page

Marblehead Land Co. v. *City of Los Angeles*, 47 F. (2d) 528, cert. den. 284 U. S. 634, 76 L. Ed. 740 .... 8, 14
Nectow v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842 .... 8, 14
Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A.L.R. 853 .... 5, 7, 9
Radice v. *New York*, 264 U. S. 292, 68 L. Ed. 690 8
Radio Station WOW v. *Johnson*, 326 U. S. 120, 89 L. Ed. 2092 6
Roman Catholic Archbishop v. *Baker*, 15 P. 2d 391 10
Roman Catholic Archbishop v. *Hill*, 90 P. (2d) 217 10
Sherman v. *Sims*, 183 S. W. (2d) 415 9
State v. *City of New Orleans*, 154 La. 271, 97 So. 440 9
State v. *Houghton*, 273 U. S. 671, 71 L. Ed. 832 14
State ex rel. Berry v. *Houghton*, 204 N. W. 569, aff'd 273 U. S. 671, 71 L. Ed. 832 7
State ex rel. Hacharedi v. *Baxter*, 74 N. E. (2d) 242 10
State ex rel. Synod of Ohio v. *Joseph*, 39 N. E. (2d) 515, 138 A.L.R. 1274 10
Sunny Slope Water Co. v. *Pasadena*, 1 Cal. (2d) 87 15
Washington ex rel. Seattle Trust Co. v. *Roberge*, 278 U. S. 116, 72 L. Ed. 210 7
Welch v. *Swasey*, 214 U. S. 91, 53 L. Ed. 923 7
West Virginia State Board v. *Barnette*, 319 U. S. 624, 87 L. Ed. 1628 12
Wilkins v. *City of San Bernardino*, 29 Cal. (2d) 332 5
Zahn v. *Board of Public Works*, 274 U. S. 325 .... 8, 14

STATUTES CITED

California Constitution, Art. XI, sec. 8 2
California Constitution, Art. XI, sec. 11 2
California Stats. 1935, p. 2172 2
California Stats. 1935, p. 2202 2
Constitution of the United States, Amendment XIV, section 1 11
28 U.S.C. 43 11

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IN THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT. STATE OF CALIFORNIA

Civ. 3734

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, A UTAH CORPORATION, SOLE,

Plaintiff and Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, AND ROSS GARDNER, AS BUILDING INSPECTOR, AND HAROLD COULTHURST, AS CITY MANAGER OF THE CITY OF PORTERVILLE, A MUNICIPAL CORPORATION,

Defendants and Respondents

APPELLEES' STATEMENT OF MATTERS AND GROUNDS MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES; AND MOTION TO DISMISS APPEAL, OR IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT HEREIN.

I

Pursuant to Rule 12, Paragraph 3, Rules of the Supreme Court of the United States, appellees file this statement, disclosing the matters and grounds making against the jurisdiction of the United States Supreme Court asserted

by appellant; and hereby move to dismiss the appeal, or in the alternative, move to affirm the judgment appealed from.

II

State Action, the Validity of Which Is Assailed

California Constitution, Art. XI, sec. 8 provides for establishing chartered cities, which shall have autonomy in municipal affairs. Under this authority, the city of Porterville received its charter (Cal. Stats. 1935, p. 2172) which charter provides in Sec. 71 (Cal. Stats. 1935 at p. 2202):

> "Sec. 71. The City of Porterville is hereby declared to be primarily a residential city and the council shall have the power to establish such zoning systems within the city as may in its judgment be most beneficial, and in such zoning systems may prohibit the erection or maintenance of any class or classes of buildings within certain areas, and may classify and reclassify the zones established . . ."

Such provision was adopted by the electorate of the City of Porterville, and ratified by the legislature, as provided in California Constitution, Art. XI, sec. 8. Likewise, California Constitution Art. XI sec. 11 confers on all cities the power "to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws," and this is an additional source of constitutional authorization.

Ordinance #383 of the City of Porterville provided for four residential zones: R-1, single family residence; R-2, duplex or two-family residences, plus R-1 uses; R-3 apartment houses and multiple family residences, plus R-1 and R-2 uses; and R-4, unlimited residence zone, including libraries, schools, churches, museums as well as R-1, R-2, and R-3 uses. Actually, three residential zones were set up in adoption of the zoning plan, consolidating R-3 and R-4;

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plus one business, and one manufacturing zone. (Clks. Tr. p. 20, Zoning Map.)

Compare ordinance under consideration in Euclid v. Ambler Realty Company, 272 U. S. 365, 380-383, wherein the residence zone U-3, classified churches, schools, museums, libraries and other public or quasi-public uses for use therein.

In the language of the Court: "U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening; U-2 is extended to include two family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds and recreation buildings and a city hall and courthouse . . ."

Compare also the ordinance before the Court in Zahn v. Board of Public Works, 274 U. S. 325, which involved five zones, in which the second residential zone "B" (described in the opinion p. 327) included "residential purposes, churches, private clubs, educational and similar purposes."

The Zoning Map by which the limits of the zones were fixed was adopted July 16, 1940. (Clerks Tr. p. 20 Exhibit 1). Petitioner-appellant acquired its property after the passage of the ordinance on March 19, 1945. While the complaint (Par. III clks. tr. pp. 2-3) would indicate that the property was then outside of the limits of the city and thereafter was annexed and zoned as R-1, it was stipulated that at the time of purchase, the city boundary ran through the lot, it then being partially in R-1, and that by the annexation, all of the lot became R-1 (Rep. tr. p. 8, l. 6-20).

III

Questions Raised Before the State Courts

Appellant in its statement relative to the basis of jurisdiction (point IV) has indicated its contention of law. Before the District Court of Appeal, State of California, appellant in its Reply Brief (page 5) thus stated the issue:

> "There is not here posed, therefore, a question of arbitrary or discriminatory action under an ordinance conceded to be generally valid but claimed to be unreasonable as sought to be enforced with respect to a particular piece of property. Rather, the contention here is that the prohibition of churches in virtually all residential zones is on its face not a proper exercise of the police power, and that it violates the constitutional immunity of freedom of religious worship."

Under well-established California authority, the trial court and District Court of Appeal decided that it could not be said that on its face the ordinance was invalid per se as an exercise of the police power, in classifying churches with other public buildings and quasi-public buildings as an R-¾ use, and not permitting such use in an R-1 zone; nor was such an ordinance unconstitutional per se for want of due process of law by reason of any claimed impairment of worship "prohibiting the free exercise thereof." This is not a case where a worshipper claims interference by the State with his religious practices or beliefs. It is a case where a corporate property owner seeks immunity from civil authority on the ground that it, if permitted, will devote the property to religious purposes. The District Court of Appeal stated in its opinion:

> "We find no merit in plaintiff's contention that the application of the ordinance results in an unwarranted restriction of religious worship. The petitioner is not

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a congregation, but holds his property as a corporation sole, the existence of which depends upon the laws of the State. Having such right from the State, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit any one from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose."

The basic attack upon appellant's complaint in the California courts was, however, that it did not state facts sufficient to constitute a cause of action. The allegations essential to set up denial of due process, and the allegedly arbitrary and unreasonable character of the ordinance in its application to petitioner's property were in the form of legal conclusions, which under the well-established rules of pleading in such matters were insufficient to state a cause of action. The opinion of the District Court of Appeal sets forth the charging allegations, and holds them insufficient, citing *Wilkins* v. *City of San Bernardino*, 29 Cal. (2d) 332, 344.

IV

The Judgment Resting on a Valid Non-Federal Ground as Well as a Federal Ground, It Should Be Affirmed, or the Appeal Dismissed.

The appellant's complaint in this case, held insufficient as a matter of pleading by the California courts, would have been held insufficient in a federal court. The burden of proving that a legislative act within the scope of the police power is arbitrary is not sustained by making general conclusions of law, but facts relied upon to rebut the presumption of constitutionality must be set forth specifically:

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 80 L. Ed. 138, 56 S. Ct. 159, 101 A. L. R. 853;

Leventhal v. *District of Columbia,* 100 F. (2d) 94, 69 App. D. C. 229 (zoning case).

The determination of this matter of pleading was sufficient to dispose of the entire case, on an independent non-federal ground, aside and apart from the legal conclusions asserting an alleged violation of federal right:

Commercial Bank v. *Rochester,* 82 U. S. (15 Wall) 639, 21 L. Ed. 117;

Radio Station WOW v. *Johnson,* 326 U. S. 120, 129, 89 L. Ed. 2092, 2100;

Giles v. *Teasley,* 193 U. S. 146, 48 L. Ed. 655;

City of New Orleans v. *New Orleans Waterworks Co.,* 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. 142;

Eustis v. *Bollis,* 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131;

Brown v. *Union Pac. R. Co.,* 267 U. S. 255, 69 L. Ed. 601.

(B) The *general* attack made upon the ordinance is without merit as a substantial federal question, having been set at rest by previous decisions of the Court:

As indicated in paragraph II, supra, the Porterville ordinance, as do hundreds of ordinances throughout the United States, follows the general zone divisions adjudicated in *Euclid* v. *Ambler Realty Company,* 272 U. S. 365, 380-383. That case involved a general attack on the validity of the ordinance. The Court stated (p. 385): "Specifically, there is nothing in the record to suggest that any damage results from the presence in the ordinance of those restrictions relating to churches, schools, libraries and other public and semi-public buildings," and the court further stated, "we cannot assume the existence of facts which would justify an injunction upon this record in respect to this class of restriction."

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The general power to zone being beyond question, the ordinance in its general scope must be declared valid.

Washington ex rel. Seattle Trust Co. v. *Roberge*, 278 U. S. 116, 120, 72 L. Ed. 210, 213.

It would be competent to consider whether the details of the zoning plan, applied to the particular premises, make them unreasonable or arbitrary, if the facts alleged would permit.

Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 395, 72 L. Ed. 303, 314.

But appellant's failure to plead facts precludes application of this principle. On demurrer, it is impossible to consider plaintiff's property in relation to others, or in relation to the general zoning plan.

Cf. *DeLano* v. *City of Tulsa*, 26 F. (2d) 640, 645, cert. den. 278 U. S. 654, 73 L. Ed. 564;

Hadacheck v. *Sebastian*, 239 U. S. 394, 412, 60 L. Ed. 348, 36 S. Ct. 143, 146.

It is presumed that the legislative body investigated and found conditions such that the legislation enacted was reasonable and appropriate:

State ex rel. Berry v. *Houghton*, 204 N. W. 569, 571 aff'd 273 U. S. 671, 71 L. Ed. 832;

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 185, 80 L. Ed. 138.

Great weight is given to the determination of the local body familiar with local conditions:

Welch v. *Swasey*, 214 U. S. 91, 106, 53 L. Ed. 923;

Laurel Hill Cem. Ass'n v. *San Francisco*, 216 U. S. 358, 365, 54 L. Ed. 515.

The situation is akin to those cases in which the facts upon which the appellant relied to bring a federal statute into

operation were found not to exist by the lower court, with the result that the motion to dismiss the appeal was granted:

Crary v. *Devlin*, 92 U. S. 397, 23 L. Ed. 510 (see 154 U. S. 619).

We therefore submit that the case is within the rule announced by the Court in *Zahn* v. *Board of Public Works*, 274 U. S. 325. Therein, it was held that a comprehensive zoning ordinance regulating the character of buildings which lawfully might be erected in designated districts is not repugnant to the due process of law and equal protection clauses of the 14th Amendment; and that the determination of a city council that a certain district shall be included within a particular classification of comprehensive zoning plans will not be disturbed, if the question whether the plan was unreasonable, arbitrary or an unequal exercise of power is fairly debatable.

Radice v. *New York*, 264 U. S. 292, 68 L. Ed. 690;
Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 388;
Marblehead Land Co. v. *City of Los Angeles*, 47 F. (2d) 528, cert. den. 284 U. S. 634, 76 L. Ed. 740;
Nectow v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842.

Since appellant purchased its property after the zoning restriction was in effect, it cannot be urged that the effect of the ordinance is to take appellant's property without due process of law; even if appellant purchased in the mistaken belief of the invalidity of the ordinance or that the property was outside the city:

DeLano v. *City of Tulsa*, 26 F. (2d) 640, 645, cert. den. 278 U. S. 654, 73 L. Ed. 564.

The statement of appellant in its *Statement of Basis* etc. pp. 7-8 that "The appellate courts of other states which have dealt with similar ordinances have in all instances held

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such ordinances unconstitutional as violative of due process" is a glittering half-truth. The major "similarity" of such ordinances was that they involved churches; the crucial determination of *lack of due process* rested upon bases utterly lacking in the instant case.

The property concerned in *Sherman* v. *Sims* (Tex.) 183 S. W. (2d) 415, aff'g 181 S. W. (2d) 100, was a house, already constructed and within the prohibited zone. Other churches had been given permission to build in the zone. Before purchase, the owner had been assured by the building inspector the property might be used for the purpose. On trial, counsel conceded the invalidity of the restriction in so far as the prior permits had been given to other churches. The exercise of the police power was held to extend to churches, but it was held that the public authority had not affirmatively established the necessity of the restriction to further the public health, safety or morals. Therefore, an injunction was issued. Unlike the present case, the determinations were made after trial. The burden of proof in Texas was placed on the city, rather than the protestant, as is the rule in California and in the U. S. Courts:

Acker v. Baldwin, 18 Cal. (2d) 341, 345, 346;
State v. *City of New Orleans*, 154 La. 271, 97 So. 440;
Dundee Realty Co. v. *Omaha*, 13 N. W. (2d) 634, 640;
Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 80 L. Ed. 138,

in which (as in *Euclid* v. *Ambler Realty Co.*, supra) it was held: When the legislative exercise of the police power is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of such facts (p. 185) and the one who assails it must carry the burden to show it is arbitrary. Allegations of the complaint which are conclusions of law are insufficient (p. 185).

The facts relied upon to rebut the presumption of constitutionality must be alleged.

In *Washington ex rel. Seattle Trust Co.* v. *Roberge*, supra this court held that where zoning or rezoning is made to depend upon the consent or nonconsent of adjacent property owners, which could be given or withheld at pleasure, there is denial of due process. *Roman Catholic Archbishop* v. *Baker* (Ore.) 15 P. (2d) 391, was a case in which the necessary number of signatures could not be obtained, consent to the construction of a parochial school on developed church property was therefore denied by the Council, and a lack of due process resulted. Where written permission of 75% of the adjacent owners was demanded, the Nevada Court in *Roman Catholic Archbishop* v. *Hill*, 90 P. (2d) 217, therefore held invalid the Reno ordinance; and in *Ellsworth* v. *Gercke*, 156 P. (2d) 242, the classification scheme of itself was held to be discriminatory; the trial court substituting its own findings for those of the city council, which as a matter of local law is contrary to the California rule:

Lockhard v. *Los Angeles*, 33 Cal. (2d) —, 33 Adv. Cal. 427, 202 P. (2d) 38, 43.

In the *Ellsworth* case, the church was petitioning to be admitted to the very use zone in which churches *are* permitted in the Porterville ordinance, together with schools, libraries, museums, art galleries, etc.

The case cited by all the above cases, and on which the *dicta* is based relative to the zoning of churches in general, is *State ex rel. Synod of Ohio* v. *Joseph*, 39 N. E. (2d) 515, 138 A. L. R. 1274, which however has been completely explained and limited, if not repudiated, by the Ohio court in *State ex rel. Hacharedi* v. *Baxter*, 74 N. E. (2d) 242, 244. In upholding a zoning ordinance prohibiting the use of property in a residential district for school purposes, the Ohio court clearly indicated that the prior opinion was based upon

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estoppel in pais, the city officers having induced the relator to purchase the property in question for the use later sought to be prohibited; and it further appeared that the determination to bar the zone to the petitioner was *administrative* rather than legislative.

(C) No substantial Federal question is involved in the contention that in limiting the erection of church buildings to a portion of the residential areas in Porterville there is an "unwarranted restriction of religious worship."

The quoted phrase does not reflect the legal considerations involved.

The First Amendment, stated frequently to have been carried into the Fourteenth by the "due Process clause" provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This relates to Congressional, not state, action.

The "free exercise of religion" therefore must be embraced, if at all, by Amendment XIV, section 1, which in part is, "nor shall any state deprive any person of life, liberty, or property without due process of law." It is not embraced under the "privileges and immunities" of citizens of the United States:

> Stone, J., in *Hague* v. *Comm. Ind. Org.,* 307 U. S. 496, 520-522;

and in fact, appellee corporation sole is not a "citizen" under the Fourteenth Amendment or under Title 28 U. S. C., Sec. 43:

> *Hague* v. *Comm. Ind. Organization,* 307 U. S. 496.

The denial of a building permit to appellant did not prohibit anyone worshipping, dictate his belief, censor it, or force external conduct incompatible with religious belief. We believe consideration of the history of the constitutional

freedom, so elaborately developed in *Everson* v. *Board of Education*, — U. S. —, 91 L. Ed. 472, 67 S. Ct. 504, discloses clearly that a nondiscriminatory ordinance, assigning church buildings to a zone with other buildings devoted to public assembly, is not a deprivation of "liberty" without due process of law.

As was said in the concurring opinion of Messrs. Justices Jackson, Black and Douglas, in *W. Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 87 L. Ed. 1628 at 1640:

> "No well ordered state can leave to the individual an absolute right to make final decisions, unassailable by the State, as to what they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressing imminent danger, or which, without any general prohibition, merely regulate time, place or manner of religious activity."

Mr. Justice Frankfurter, further on in the same case (87 L. Ed., p. 1646), states:

> "The individual conscience may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may 'exercise' it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way or by stealth."

Appellant in the trial court freely conceded that the police power of the State extended to the regulation of church structures; that a city might say *of what* and *how* they should be built, but not where (Rep. Tr. p. 75, lines 11-19). In drawing the line in rendering unto Caesar that which is Caesar's, and unto God that which is God's, this is an attenuated distinction.

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The suppression of the right of free speech has been held justified only to protect the public from grave, immediate dangers. Appellant seeks to apply this concept to the erection of a building; if it is a grave and immediate danger, it can be abated as a nuisance, or regulated *ex post facto*. As applied to buildings, this was the very argument which was asserted against the validity of all zoning. Zoning is prospective; for the orderly development of a community, taking care of the future as well as present needs, it must maintain orderly development in specified areas; and in so doing, to protect the future, to provide for the development of municipal facilities pertinent to the health, welfare and safety, will frequently prohibit in certain areas those uses which might not now be any "grave or immediate danger" —in other words, a demonstrable public nuisance.

The decisions of this court do not so shackle the police power. In its essence, this contention was met head on and rejected in *Euclid* v. *Ambler Realty Co., supra,* and *Zahn* v. *Board of Public Works, supra.*

A church as an institution, as a congregation, as a doctrinal concept, is untouched by the ordinance in question. A church *building* is still a building, subject to the hazards of nature and of man, no matter how sanctified by its devotion to a holy purpose. As a place of public assembly, it has the same characteristics as a lodge room, a community center (in fact, appellant proposes a "youth center" as part of its project), a school, a museum. The gathering of crowds, for the protection of people in numbers, calls for the presence of quite different fire, water, police and sanitary developments than where single family residences are involved. People in numbers create noise, increase safety problems in the movement, parking, and protection of motor vehicle traffic, require different street development and police than in single family residence zones. Noise is a necessary con-

comitant to the movement of large numbers of people, concentrated in attendance at a single building. The public safety is advanced, when places where people will concentrate are coordinated with fire protection and hospital facilities. The appellate court aptly observed that it would be strange if single family dwellings in R-1 could be protected from the influx of the two-family dwelling while the greater concentrations brought in by assemblages in public buildings, such as churches, could not be excluded.

We believe that the validity of the Porterville ordinance cannot be questioned, under the well-established principles approved heretofore by this Court and other Federal courts, and submit that the judgment should be affirmed.

Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303;

Zahn v. *Board of Public Works*, 274 U. S. 325, 71 L. Ed. 1074;

Nectow v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842;

State v. *Houghton*, 273 U. S. 671, 71 L. Ed. 832, aff'g 204 N. W. 569;

DeLano v. *City of Tulsa*, 26 F. (2d) 640, cert. den. 278 U. S. 654, 73 L. Ed. 564;

Marblehead Land Co. v. *City of Los Angeles*, 47 F. (2d) 528, cert. den. 284 U. S. 634, 76 L. Ed. 540, 52 S. Ct. 18;

Koch v. *City of Toledo*, 37 F. (2d) 336.

The zoning ordinance operates on the *property* and not on the personal liberty or conscience of the corporate appellant, and the real property used for church purposes is not different than other property of similar use, such as that devoted to schools, lodges, museums, community centers and clubs. To maintain that because of its purpose, a church building should have preferential treatment over such other uses would in itself create an unwarranted and perhaps un-

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constitutional discrimination. If all were held entitled to be admitted, then the single family residence zone would in fact be destroyed. If the use to which the building is to be put is of paramount importance to the community, then the community is best fitted to determine its physical place. Appellant does not, and cannot, argue that any liberty of conscience or of worship for it has been denied. The argument is, that since the church is of such great, moral, social benefit to the community it is entitled to immunity from its civil restrictions and arrangements; and that if the city council doesn't concede the claim, it is a judicial matter. How far can any religious group claim immunity under one phase of the constitutional guaranty without running into the constitutional prohibition which is likewise part of it? Immunities may easily reach the stage that they in fact establish "religion" at the public expense. The same claim made by appellant would be made on exactly the same ground, constitutionally, as would one made by a society of atheists seeking to dispel belief in God and desiring to build a hall to conduct their efforts. Water is absolutely essential to life, but that does not give water production a preferred place in the residentail zone of a California city: *Sunny Slope Water Co.* v. *Pasadena*, 1 Cal. (2d) 87, 94. Food, likewise, is essential, but it needs no citation of authority to support the exclusion of such uses from the residential zones beyond *Eucild* v. *Ambler Realty Co., supra.*

> "It is not necessary, for the validity of the ordinance in question, that we should deem the ordinance justified by considerations of public health, safety, comfort or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the ordinance, we must assume they did justify them.
>
> "If the municipal council deemed any of the reasons which have been suggested or any other substantial

reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of wisdom or good policy of municipal ordinances. If they are not satisfactory to the majority of the citizens, their recourse is to the ballot, not to the courts."

State v. *New Orleans*, 154 La. 271, 97 So. 440, and *Lockard* v. *Los Angeles*, 33 A. C. 427, 202 P. (2d) 38, 43;

Euclid v. *Ambler Realty Co.*, 272 U. S. 365, 388;

Zahn v. *Board of Public Works*, 274 U. S. 325, and opinion of California Supreme Court, 195 Cal. 477, 492 (affirmed).

Respectfully submitted this 2d day of July, 1949.

CITY OF PORTERVILLE AND
ITS OFFICERS DEFENDANT,
Defendants and Appellees.
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